

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General
3 JONATHAN K. RENNER
Supervising Deputy Attorney General
4 NATHAN R. BARANKIN, State Bar No. 246313
Deputy Attorney General
5 1300 I Street, Suite 125
P.O. Box 944255
6 Sacramento, CA 94244-2550
Telephone: (916) 323-8050
7 Fax: (916) 324-8835
E-mail: Nathan.Barankin@doj.ca.gov
8 Attorneys for Office of Secretary of State

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 **MARKHAM ROBINSON, in his capacity as the**
14 **Presidential Elector and Chairperson-Elect of the**
American Independent Party

15 Plaintiff,

16 v.

17 **SECRETARY OF STATE DEBRA BOWEN, in her**
individual and official capacities, THE
18 **REPUBLICAN NATIONAL COMMITTEE, and**
organization, form unknown, THE REPUBLICAN
19 **PARTY OF CALIFORNIA, an organization, form**
unknown, SENATOR JOHN McCain, in his
20 **individual and official capacities, DOES ONE**
through FIFTY FIVE, inclusive,

21 Defendants.
22

CaseNo.: 3:08-CV-03836 WHA

**DEFENDANT SECRETARY
OF STATE DEBRA BOWEN'S
OPPOSITION TO
PLAINTIFF'S REQUEST FOR
ENTRY OF DISMISSAL**

Date:
Time:
Dept: 9
Judge: The Honorable
William Alsup
Trial Date:
Action Filed:

1 On September 9, 2008, Plaintiff filed a request seeking entry of default against
2 Secretary of State Debra Bowen ("Secretary") based on the allegation that the Secretary did not
3 timely file a proper responsive pleading to Plaintiff's complaint. Pl.'s Req. For Entry of Default,
4 Doc. No. 35. Plaintiff's request should be denied for two reasons. First, the Secretary did timely
5 file a proper response pursuant to the Court's scheduling order. Scheduling Order, Doc. 21;
6 Bowen Opp'n, Doc. 31. Second, the Secretary's efforts to defend against Plaintiff's action
7 establish that an entry of default is improper.

8 Pursuant to the Court's scheduling order, the only document the Secretary was
9 authorized to file was an "opposition" to plaintiff's motion for a preliminary injunction by
10 September 4, 2008.¹ Doc. 21. It was entirely within the prerogative of the Court to issue a
11 scheduling order establishing the type and timing of briefs to be filed in this action. Fed. R. Civ.
12 P. 16. By timely filing her opposition, the Secretary filed a proper response to Plaintiff's
13 preliminary injunction motion. Further, though styled as an "opposition," the Secretary
14 specifically requested that, pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court
15 dismiss Plaintiff's action for failure to state a claim. Bowen Opp'n, Doc. 31, p. 4:2-7. Thus,
16 even if one chose to ignore the Court's scheduling order, Plaintiff's request for default should be
17 rejected because the Secretary filed a proper motion in response to Plaintiff's motion for a
18 preliminary injunction.

19 Plaintiff's request also should be rejected because default may only be entered against a
20 party that has failed to plead or otherwise defend in an action. Fed. R. Civ. Proc. 55. Under this
21 standard, the key issue is whether the Secretary has asserted a defense to the action, even if a
22 responsive pleading has not yet been served. 10 *Moore's Federal Practice*, § 55.11[2][b]
23 (Matthew Bender 3d ed.). Here, the Secretary's opposition and request that the Court dismiss
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25 1. The Court's scheduling order also authorized the filing of "defendants' motion to
26 dismiss" by August 28, 2008. Order, Doc. 21. This portion of the order applied to the Republican
27 National Committee, Senator John McCain, and the California Republican Party, who, at the August
28 21, 2008 hearing, urged the Court to forego any briefing on Plaintiff's preliminary injunction motion
pending resolution of their anticipated motion to dismiss. The Secretary neither sought nor obtained
permission from the Court to file a separate motion to dismiss.

1 Plaintiff's action constitutes a defense. Accordingly, Plaintiff's request for default should be
2 denied.

3 Notwithstanding the above, if the Court concludes that Plaintiff's request deserves any
4 credence whatsoever, the Secretary is prepared to re-style its opposition and file a Motion to
5 Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief. *Mitchell v. Brown &*
6 *Williamson Tobacco Corp.*, 294 F.3d 1309, 1317 [late filed responsive pleadings prevent an entry
7 of default]. A copy of this motion is attached as Exhibit A for the convenience of the Court.

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9 Dated: September 11, 2008

10 Respectfully submitted,

11 EDMUND G. BROWN JR.
12 Attorney General of the State of California

13 CHRISTOPHER E. KRUEGER
14 Senior Assistant Attorney General

15 JONATHAN K. RENNER
16 Supervising Deputy Attorney General

17 /s/ Nathan R. Barankin

18 NATHAN R. BARANKIN
19 Deputy Attorney General

20 Attorneys for the Office of the Secretary of
21 State

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